

# Modern Awards Review 2023-24 (AM2023/21)

## Submission cover sheet

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### Modern Award Review Stream:

Arts and Culture:

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Work and Care:

Usability of awards:



# Modern Awards Review 2023-24

Submission by the Australian Council of Trade Unions in  
response to the *Work and Care* Discussion paper.

ACTU Submission 12 March 2024

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## Preface

1. The ACTU is Australia's sole peak body of trade unions, consisting of affiliated unions and State and regional trades and labour councils. There are currently 36 ACTU affiliates who together have over 1.7 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.
2. Since its formation in 1927, the ACTU has played the leading role in advocating for the improvement of working conditions in almost every Commonwealth legislative measure concerning employment conditions and trade union regulation. The ACTU has also appeared regularly before the Fair Work Commission and its statutory predecessors, in numerous high-profile test cases, as well as annual national minimum and award wage reviews.
3. Gender equality is a key concern of the ACTU and its affiliated unions. We have been enthusiastic supporters of recent reform efforts in this respect, informed by the experiences of our affiliates. We welcome the opportunity to participate in the *Work and Care* stream of the Fair Work Commission's Modern Award Review 2023-24 (the review).
4. Our submission is intended to identify issues which may inform the consultations and the final report. It reflects a consensus position of our affiliates on work and care issues which relate to particular questions posed by the FWC discussion paper, with respect to modern awards generally. It is not a comprehensive statement of the entirety of the concerns and suggestions our affiliates wish to raise with the content or operation of modern awards collectively or individually. Our affiliates will make their own submissions to this review, which the ACTU supports, and which builds on this consensus position with industry or occupation-specific proposals or concerns.
5. The current regulatory framework and the way in which work is organised is failing to support many Australians to be both workers and carers. This is the experience of our affiliates, and is supported by the findings of the Senate Select Committee on Work and Care<sup>1</sup>.
6. Women make up 71.8% of people who identify as primary carers.<sup>2</sup> The impact of women's care burden and the resulting work/care collision has been thoroughly examined over many years, with evidence demonstrating that for women, the effect is 'curtailed career aspirations, reduced life-

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<sup>1</sup> The Senate Select Committee on Work and Care: Final Report

<sup>2</sup> Discussion paper at [49].

time earnings, and inadequate superannuation.<sup>3</sup> The propensity of women with care responsibilities to end up in ‘poorly remunerated and insecure work without training and promotion opportunities, and with continuing clashes between work and care responsibilities’ has also been well-documented over many years.<sup>4</sup>

7. Many of the issues raised in the discussion paper, including the predominance of part time employment arrangements characterised by low guaranteed hours and highly changeable rosters, inconsistent access to shift penalties and overtime as a result of span of hours provisions, overtime and time off in lieu of overtime arrangements, minimum engagements, access to additional annual leave, low remuneration for on-call and recall to duty, and unpaid time for work-related travel, training and administrative responsibilities disproportionately impact on women workers. They have significant negative impacts on the ability of workers to plan for and balance their unpaid caring responsibilities outside the workplace with their work commitments, plan financially and achieve economic security. There is a stark gendered difference in these entitlements between awards covering male dominated industries and those covering female dominated industries, with workers in female dominated industries being worse off in many ways – including have less secure employment, more unpredictable and precarious working arrangements, lower incomes, and less ability to manage their caring responsibilities.
8. Further, workers do not currently have adequate time or leave entitlements for their life outside of work, including to manage their caring responsibilities. Personal and carer’s leave entitlements are generally insufficient in their quantum, and their narrow scope means they do not reflect the diverse nature of families and caring arrangements, and exclude many workers with caring responsibilities. The particular caring and cultural obligations of First Nations workers are also poorly recognised in awards.
9. Despite recent improvements to flexible working arrangements, the right to request entitlement is still inadequate in several important ways, including that it’s not available to more workers, only available to workers with 12 months service, and is too easily refused by employers.
10. Finally, there are many ways in which awards do not provide workplace conditions that facilitate women’s full economic participation and gender equality, that although not raised in the discussion paper warrant consideration in this review.

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<sup>3</sup> Chapman. A, Industrial Law, Working Hours, and Work, Care and Family, Monash University Law Review (Vol 36, No 3), 190-216.

<sup>4</sup> Ibid at 201 and 202, and references.

11. Despite some significant improvements, much of modern work is still organised around an old idea: the default (male) employee unencumbered by parenting and caring responsibilities and available to work full-time throughout their life. The system of workplace regulation and workplace norms still largely adhere to this idea. When workplaces were designed the workforce was mostly made up of men, with women mostly taking on unpaid caring responsibilities in the home. Therefore the system of workplace regulation and workplace norms were not been designed for the needs of women or workers with caring responsibilities. Despite some progress (such as flexible work, paid parental leave and so on), carers of children and others are still mostly required to work around this norm; any departure from the norm is required to make out a case to justify the departure. This situation is fundamentally disconnected from the reality of people's working lives. The sheer number of issues raised in the discussion paper, and the gendered impacts they have, is a sign of how much more work there is to be done.
  
12. There is a clear need to establish a new 'work and care social contract' appropriate for the 21st century, with a right to care, alongside the right to work.<sup>5</sup> Simply providing a living wage as income in exchange for work is not fit for a world where so many workers are required to combine their jobs with the care of others. This new social contract must include a review and changes to awards to ensure they accommodate the needs of women and carers, and continue to meet the Modern Awards Objective.

## Recommendations

### Recommendation 1

That this review encompasses all awards.

### Recommendation 2

That the following matters are addressed in modern awards:

- Providing security around patterns of hours that have become regular. For example, where additional hours are worked on a regular basis over 6 months, employees should have the right to elect to convert those additional hours to be part of their permanent ordinary contracted hours. There should be provision for 6 monthly reviews of part time hours to facilitate this.
- Fairness and certainty on minimum engagements, including on a weekly basis for part time workers (for example a 15 hour minimum for part time employees in the awards that cover SDA members, as identified in the SDA submission).
- Ensuring that prior to commencing employment, employees and employers agree in writing on a regular pattern of work including the days, hours and start/finish times.

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<sup>5</sup>The Senate Select Committee on Work and Care: Final Report

- Ensuring part time workers are paid overtime for working outside agreed hours.
- Providing a process whereby employees who work hours that are “irregular, sporadic or unpredictable” are given an opportunity to express their interest in working hours which are regular and predictable, and an obligation on employers to provide such hours where operational requirements allow.
- Requiring employers to inform those employees when such hours were available to them (even if only on a temporary basis), and what payment they would attract.

### **Recommendation 3**

That the Commission note in its report the ACTU view that individual flexibility arrangements have been inconsistent with the new modern award objective and should not be required or permitted in modern awards.

### **Recommendation 4**

If Individual Flexibility Arrangements are to be retained in modern awards, the Commission should vary the standard term for individual flexibility arrangements by:

- Relocating the final subclause of the standard term as the first and supplementing it to alert readers to the NES right to request a flexible working arrangement;
- Ensuring that an employer’s “proposal” for an IFA includes a draft of the IFA;
- Ensuring that an employer’s “proposal” for an IFA includes a statement to the effect that the employee is free to choose agree or not agree to the proposal; discuss, seek advice or be represented in relation to the proposal; and put forward an alternative;
- Ensuring that an employer’s “proposal” for an IFA, and any IFA made, states the employer’s assessment as to whether the IFA will result in any improvement to the regularity and predictability of the employee’s work and income;
- Referring to the capacity to bring disputes under the dispute resolution procedure and to the Commission’s power to make conciliate, mediate, express an opinion or make a recommendation; and
- Providing a capacity for the Commission to review an IFA and express an opinion about whether it continues to meet the BOOT and whether any expectations concerning improvements to regularity and predictability of hours and income had been realised.

### **Recommendation 5**

That the Commission invite parties to consider seeking variations to awards to require reporting on individual flexibility agreements, only in the event that the government indicates that it does not intend to legislate to abolish IFAs or require reporting in both awards and enterprise agreements.

### **Recommendation 6**

Awards should be varied to make the right to request flexible work available to all workers (regardless of length of service or the reason). There should also be a collective right for groups of employees to request flexible work and to bring collective disputes regarding flexible work. In the alternative, award variations should be made to ensure that flexible work arrangements are available to more workers as follows:

- Expand the definition of carer to include all workers with caring responsibilities, not just those within the meaning of the Carer Recognition Act; and
- Allow employees to request flexible working arrangements for reasons relating to their reproductive health.



### **Recommendation 7**

Awards should be varied so that employers are required to reasonably accommodate flexible working arrangements unless it causes them unjustifiable hardship.

### **Recommendation 8**

Awards should be varied to allow workers with caring responsibilities to revert back to their former working hours following a period of part time or reduced hours of work.

### **Recommendation 9**

Awards should be varied to ensure that:

- Any agreements made under facilitative provisions must ensure that employees are better off overall.
- The following principles be incorporated into awards to clarify that:
  - Facilitative provisions are not a device to avoid award obligation, and should not result in unfairness to employees covered by the award;
  - To ensure that a facilitative provision operates fairly, the Commission may prescribe safeguards, which will depend on the nature of the provisions sought and the circumstances of the particular industry;
  - The implementation of facilitative arrangements should be recorded in the time and wages records kept by employers pursuant to Division 1 of Part 9A of the Workplace Relations Regulations;
  - The relevant unions are notified regarding the intention to utilise the facilitative provision and provide them with a reasonable opportunity to participate in negotiations regarding its use; and
  - There be a monitoring process under which facilitative provisions are reviewed after a reasonable period to consider its impact in practice.

Further, consideration should be given to how changes made through facilitative provisions can be subject to scrutiny by the Commission – for example, through regular reports regarding their use.

### **Recommendation 10**

Awards should be varied to provide workers with the right to request work from home arrangements on an individual and collective basis, with access to dispute resolution by the Commission, and the same requirements for employers in terms of responding to the request and the information they need to provide to employees as a flexible working request. The right should be available to all workers, regardless of their length of service or reason for requesting WFH arrangements. Employers should only be permitted to refuse a request on reasonable grounds. There should be clear, objective and industry-specific criteria in each relevant award to determine the reasonableness of a refusal.

### **Recommendation 11**

Awards should be varied as follows:

- To provide for fairness and certainty on minimum engagements, including on a weekly basis for part time workers;
- To provide for a four hour minimum engagement period as a baseline entitlement for all employees (full-time, part-time and casual) except where indicated otherwise by affiliates for

relevant awards, and excluding awards where there is a more generous entitlement that exists. The four hour minimum engagement should exclude any unpaid breaks.

- Minimum payment should apply where the rostered shift of a casual is cancelled.

#### **Recommendation 12**

- Awards should be varied to contain a relevant span of hours and all awards currently containing a span which extends beyond standard weekday daytime hours should be reviewed with regard to the impact on a worker's right and ability to care, security of hours and rostering, and in relation to gender equality.
- Where Awards retain expansive span of hours, they should be reviewed to determine if they appropriately recognise and compensate for rostering outside of standard weekday daytime hours, e.g. with appropriate shift rates, allowances and leave.

#### **Recommendation 13**

Awards should be varied to ensure that:

- All workers have access to regular, predictable patterns and hours of work.
- Advance notice of 28 days of rosters is given except in exceptional circumstances (subject to any affiliate submissions that propose a different timeframe).
- Roster changes can be made by mutual agreement only. In the alternate, there should be 28 days' notice of roster changes for all workers, including casuals (except in exceptional circumstances), and a requirement for employers to genuinely consider employee views about the impact of proposed roster changes, and take the views of the employee, including working carers, into consideration when changing rosters and other work arrangements.
- Employees have a 'right to say no' to extra hours with protection from negative consequences.
- There is a positive obligation to provide employees with rosters that accommodate caring responsibilities (Right to Care Roster Clause)
- Workers can bring rostering disputes to the FWC for conciliation and arbitration, and have the status quo apply until the matter is resolved.

#### **Recommendation 14**

The standard term concerning consultation about changes to regular rosters or ordinary hours of work should be varied to:

- ensure that the information provided by the employer about a proposed change includes information about whether the change is expected to be permanent or temporary (and, if the latter, its duration) and the expected effects of the change on employees' earnings; and
- ensure that the information provided by the employer about a proposed change is provided in writing and in a manner which facilitates employee understanding of the proposed changes, having regard to their English language skills.

#### **Recommendation 15**

Awards should be varied to:

- require employees to agree a guaranteed number of hours each week with the employee, and the time the employee is available to work those hours.
- Restrict an employer's ability from requiring employees to work outside of their agreed available hours, except with some form of penalty such as the payment of overtime.

- Ensure employees have written records of their engagement and agreed hours

**Recommendation 16**

Awards should be varied to ensure that overtime is paid on all additional hours worked outside of ordinary hours for casual, part time and full time employees.

**Recommendation 17**

Awards should be varied so that TOIL provisions provide that an employee’s entitlement to time off in lieu is equivalent to the overtime payment that would have been paid, rather than the actual time worked.

**Recommendation 18**

The Commission include in its report a recommendation that there be a review of standard working hours, the extent and consequences of longer hours of work, stronger penalties for longer hours, and ways to effectively reduce working hours.

**Recommendation 19**

Awards should be varied to rectify the differences in payment for on call and recall to work provisions, which disproportionately impact women. Ordinary rates for employees required to standby for duty should be paid across the board, or at the very least, allowances should be significantly increased. Consideration should also be given to the proper valuing of sleepover work, and its interaction with overtime and on call rates.

**Recommendation 20**

Awards should be varied to provide appropriate compensation for all hours spent on work related travel, training, administrative responsibilities and handover.

**Recommendation 21**

Awards should be varied so that when employees take annual leave they get their ordinary hourly rate (including any penalties) plus a 17.5% annual leave loading.

The Commission should consider variations that respond to specific affiliate submissions regarding increased annual leave of 5 weeks (with 6 weeks for shift workers) and flexibility in how annual leave is taken.

**Recommendation 22**

Awards should be varied as follows:

- Payment during paid leave should not fall below reasonable expectations of take home pay over the same period to ensure that workers taking paid personal and carer’s leave do not suffer a diminution in the amount they ordinarily earn.
- Paid personal and carer’s leave should be made available to employees who care or expect to care for a dependent or any other person significant to the employee to whom the employee provides regular care (in line with Recommendation 17 of the Work and Care Final Report).
- Paid personal and carer’s leave should be made available to foster parents to ensure they have access to entitlements to provide the necessary care and support to foster children in their care; and should also include kinship care.

- Paid personal and carer's leave should be extended to include a broader range of carer responsibilities that are not limited to illness, injury or emergencies, and include other caring activities such as organising formal care arrangements, attending medical and other appointments, and palliative care.
- Workers should have the ability to use enduring forms of evidence for enduring illness, injury or caring responsibilities to demonstrate their need to take personal or carer's leave, rather than being required to produce evidence on each occasion such leave is requested.
- The amount of dedicated carer's leave should be increased by 10 days.
- An additional entitlement to unlimited unpaid personal and carer's leave should be provided where paid personal and carer's leave has been exhausted, and all other forms of flexible workplace arrangements have been explored.

### **Recommendation 23**

Awards should be varied to provide an additional entitlement to unlimited personal and carer's leave where paid personal and carer's leave has been exhausted, all other forms of flexible workplace arrangements (including working from home) have been explored and exhausted, and the employee elects to take unpaid leave.

### **Recommendation 24**

Awards should be varied as follows:

- To provide for an additional amount of 10 days paid carer's leave, that can only be taken for caring purposes.
- Employees should retain the ability to access personal/carer's leave for caring purposes if they have exhausted the 10 days carer's leave, and need more paid leave for caring purposes

### **Recommendation 25**

- New ceremonial leave provisions should be included in all awards.
- Foster and kinship care should be recognised for the purposes of accessing personal and carer's leave.
- The Commission should consider the need for clauses that recognise the additional work and care requirements of First Nations employees, such as cultural load and cultural responsibility clauses that provide for an allowance or payment, and clause that provide for language allowances.

### **Recommendation 26**

The Commission should consider other award variations as outlined in the ACTU submission and the submissions of our affiliates that provide workplace conditions that facilitate women's full economic participation, and are necessary to achieve gender equality in the workplace and the modern awards objective.

## Gender equality, the modern award system and this review

### Gender Equality and the modern award system

13. This review is concerned with “the impact of workplace relations settings on work and care”,<sup>6</sup> “award provisions that likely impact on an employee’s ability to balance work and care”<sup>7</sup> and “variations to modern awards that could enhance the ability for carers to balance work and caring responsibilities, provided the Commission is satisfied it is necessary to do so to achieve the modern awards objective.”<sup>8</sup>
14. Also relevant to this review is the question of how the modern award system should respond to the amended object of the FW Act set out in s. 3(a) (“..promote gender equality..”). and the amended modern award objective set out in section 134(1)(ab) (“..the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women’s full economic participation..-”).<sup>9</sup>
15. The term ‘gender equality’ refers to both formal and substantive gender equality<sup>10</sup>, encompassing concepts of equality and equity. Gender equality means that people have equal rights, opportunities, and ultimately, outcomes. The achievement of gender equality requires redressing historic and ongoing disadvantage, and the transformation of current conditions (for example, through different and more favourable treatment).
16. In giving consideration to these issues throughout this submission, we note the views of the Annual Wage Review Expert Panel as to the proper construction of those legislative provisions.<sup>11</sup> Accordingly, we have focussed our consideration on the extent to which modern awards may, may not, or could better:
- Ensure equality between men and women of employment opportunity (including equality as to the right to work, selection for employment, promotion and access to training);

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<sup>6</sup> Discussion paper at [2]; President’s Statement, Fair Work Commission, 15 September 2023 at[3]

<sup>7</sup> Discussion paper at [38]

<sup>8</sup> Ibid at [36]

<sup>9</sup> Letter from the Hon Tony Burke, Minister for Employment and Workplace Relations and Minister for the Arts to Hatcher J, President of the Fair Work Commission, 12 September 2023, 1.

<sup>10</sup> Revised Explanatory Memorandum for the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, at [330] and [334].

<sup>11</sup> *Annual Wage Review 2022-23* [2023] FWCFB 3500 at [31]-[45]

- Ensure equality of treatment in employment (including equality as to remuneration and other benefits of employment, and as to the treatment of work value and evaluation of the quality of work);
- Ensure that people of all genders have equal, rights, opportunities and treatment in the workplace, and in terms of conditions of employment, including equal pay;
- Ensure equal remuneration for work of equal or comparable value, and eliminate gender-based undervaluation of work; and
- Provide workplace conditions (terms of employment broadly) that facilitate women’s full economic participation – such as flexible working hours, access to stable part time employment, and special types of leave.

### Inclusion of all awards in the review

17. As part of the research published for last year’s annual wage review, *A profile of employee characteristics across modern awards*<sup>12</sup> presents a range of employee characteristics using ABS microdata which, for the first time, enables analysis of employees across individual modern awards, focusing on employee, job and employer characteristics. Previous analysis of award-reliant employees was limited to examining the characteristics of those employees in aggregate or through approximation.<sup>13</sup> The report therefore provides more specific information on the employees reliant on modern awards than has previously been available.

18. One of the main findings of the report was that, compared to employees not reliant on modern awards, modern award-reliant employees are on average more likely to be female, younger, work fewer hours, earn lower wages, are far more often casually employed, and tend to work for smaller employers.<sup>14</sup> These intersectional indicators point to a heightened risk of exposure to low pay and insecure and part time work among the modern award reliant workforce compared to other employees. Specifically, the report found the following:

- almost three in five employees across all modern awards were female (58.1 per cent), which is higher than for employees not on modern awards (48.5 per cent);<sup>15</sup>
- of the 43 modern awards analysed, 25 have greater than 50% of female workers<sup>16</sup>;

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<sup>12</sup> Yuen K & Tomlinson J (2023), *A profile of employee characteristics across modern awards*, Fair Work Commission Research Report 1/2023, March.

<sup>13</sup> Ibid at p. 38

<sup>14</sup> Ibid at p. 4

<sup>15</sup> Ibid at p. 18

<sup>16</sup> Ibid at pp.52-53 & Table B1 (Appendix B).

- almost two-thirds of employees across all modern awards worked part-time hours (across all employees not on modern awards, the proportion is almost half that, at just over one-third of employees);<sup>17</sup>
- around half of employees on modern awards are casual employees, which is significantly higher than for employees not on modern awards (1 in 7 employees);<sup>18</sup>
- average hourly total earnings for adult employees on modern awards was \$30.80 (unadjusted) and \$27.70 (adjusted), compared to average hourly earnings for employees not on modern awards which were much higher, at \$46.20 (unadjusted) and \$46.10 (adjusted)<sup>19</sup>; and
- over one-third of modern award-reliant employees could be considered as low paid - compared with less than 7 per cent across employees not on a modern award.<sup>20</sup>

19. The evidence therefore suggests that in any effort to promote gender equality and job security, the modern award system is key. We note that the 25 modern awards identified in the Discussion Paper have been selected to include the most commonly used awards, the awards referred to in the Final Report of the Senate Select Committee into Work and Care (March 2023), and additional awards to capture a diverse range of industries and roles<sup>21</sup> (and that these awards cover approximately 80% of all modern award covered employees<sup>22</sup>) and submit that there is nothing in the discussion paper or other Statements concerning this review that would confine this stream to looking at those 25 awards only. Having reviewed the President’s Statements concerning this review, the contents directed to the scope of the work and care stream disclose no desire to impose such a limitation, as distinct from the comments made concerning proposals to improve the “ease of use” of modern awards.

20. Limiting this stream of the review to the 25 identified awards would fail to address the needs of the remaining 20% of award reliant workers<sup>23</sup> as well as limiting the potential “rising tide” effects which could be realised through bargaining. We therefore seek clarification that this stream of the review is not limited in this way, and that it encompasses all awards. Accordingly, unless indicated otherwise, the ACTU’s recommendations apply to all awards where applicable.

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<sup>17</sup> Ibid at p. 21

<sup>18</sup> Ibid at p. 23

<sup>19</sup> Ibid at p. 25

<sup>20</sup> Ibid at p. 26

<sup>21</sup> Discussion Paper at [39].

<sup>22</sup> Yuen & Tomlinson at Chart 3.3; Discussion Paper at [40].

<sup>23</sup> Yuen & Tomlinson at Chart 3.3.

### **Recommendation 1**

That this review encompasses all awards.

21. Further, any effective review of the modern award system requires a consideration of both the terms of modern awards and the statutory framework within which they operate. As this submission outlines, there are a range of restrictions within this framework that limit the achievement of the gender equality objective and which we recommend need legislative change. We acknowledge that the Commission's powers are not parliamentary, but do encourage it to produce a final report that at least flags up to Government the ACTU view on those statutory limitations. We have accordingly directed our recommendations to both components.

### **Conduct of the consultations**

22. Finally, we note the submission of ACCI and Deputy President O'Neill's initial comments in the Mention on 21 February 2024 about potentially only listing matters for discussion during the consultations if there are specific proposals for variations. The ACTU and our affiliates oppose such an approach, and respectfully submit that such a strict approach may unnecessarily limit discussions and what this stream of the review is able to achieve.

23. The work and care stream is different to other streams of the review in some key respects. It is clear that the review was to include one of the outcomes of the Job and Skills Summit, namely "the commencement of a consultation and research process considering the impact of workplace relations settings on work and care, including early childhood education and care, having regard to relevant findings and recommendations of the Final Report of the Senate Select Committee on Work and Care."<sup>24</sup>

24. This stream is informed by a comprehensive discussion paper, as well as additional research in the form of a literature review and employer survey. Reflecting the above approach, the discussion paper raises 18 substantive issues in awards, as well as a question regarding whether there are any other matters in awards that might require attention.

25. There was nothing in the Minister's letter or Statements made in the review about the need for specific award variations to be put forward. It is also clear from the President's Statement that the outcome of the review process will be a final report which "might provide recommendations about

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<sup>24</sup>Letter from the Hon Tony Burke, Minister for Employment and Workplace Relations and Minister for the Arts to Hatcher J, President of the Fair Work Commission, 12 September 2023; President's Statement of 15 September 2023 at [3]; Statement of Deputy President O'Neill dated 29 January 2024 at [2]



possible next steps if parties seek variations to modern awards or propose that the Commission take steps on its own motion to vary awards.”<sup>25</sup> It is therefore clear that the Review will not lead directly to any variation to modern awards. Accordingly, discussion should not be limited to specific proposals to vary awards, and there should be an ability to discuss the broad and substantial issues raised in the discussion paper and other issues identified as being relevant to this stream of the review.

26. As matter of practicality, it is also just not possible or feasible in the time provided to put forward specific variations for the vast range of award provisions examined in the discussion paper, and which are relevant to this stream of the review.
27. Given the consultative and research driven nature of the review, as well as the volume and substance of the matters raised in the discussion paper and the time constraints, we submit a more open approach to discussion will be more productive. The parties should be given the opportunity to discuss the many significant issues raised by the Commission’s discussion paper. This, in our respectful submission, will generate better ideas than the traditional, adversarial approach of industrial arbitration or a narrow focus on specific draft variations.
28. We see this stream, and the discussion paper, as an invitation to think about how provisions in modern awards impact broadly on work and care, what a ‘new social contract appropriate for the 21<sup>st</sup> century’ looks like, and what changes are required to minimum standards to ensure that awards continue to meet the Modern Awards Objective.

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<sup>25</sup> President’s Statement at [8].

## Response to Discussion Paper Questions

### Question 1 – Part Time

29. Part time employment has a gendered history<sup>26</sup>, and continues to have highly gendered impacts. Australia has a high share of part-time employment, with women more than twice as likely as men to be working part-time hours.<sup>27</sup> Feminised occupations have high rates of part-time work, relatively low rates of pay and are more likely to be affected by national skill shortages.<sup>28</sup>
30. There are a number of ways in which part-time provisions in awards should be improved for workers, both to allow them to better accommodate caring responsibilities outside of work and to ensure the Awards continue to meet the modern awards objective having regard to the new s134(1)(ab).
31. A common problem faced by part time workers (particularly in the care economy) is underemployment. Many are engaged on (often very) low hour contracts, but regularly rostered to perform close to full-time hours. This makes it more likely that part-time workers will agree to work additional hours over their agreed minimum hours when called on to do so. The capacity of employers to flex part time workers' hours up and down to their contracted hours at ordinary rates creates an effectively casualised or 'on-demand' workforce. Workers' rosters can be filled up entirely with 'additional hours' at no overtime pay, there is no regular agreed pattern of those additional hours, and as a result, weekly hours and wages become variable. This compounds upon low rates of pay in feminised industries, and creates a high level of insecurity and uncertainty, which can result in workers being reluctant to utilise leave entitlements or request flexibility. This practice was a key issue considered by the Senate Select Committee on Work and Care.
32. We note and concur with recommendations 21 and 25 of the Final Report of the Senate Select Committee on Work and Care, which provided as follows:
- Recommendation 21 – “ensure employees have a ‘right to say no’ to extra hours with protection from negative consequences.”<sup>29</sup>
  - Recommendation 25 - “restrict the use of low base hour contracts, which can be 'flexed up' without incurring any pay penalty for additional hours worked beyond contract, and

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<sup>26</sup> Discussion paper at [91].

<sup>27</sup> Ibid at [92].

<sup>28</sup> Cortis, N., Naidoo, Y., Wong, M. and Bradbury, B. (2023). Gender-based Occupational Segregation: A National Data Profile. Sydney: UNSW Social Policy Research Centre at pp 6-9.

<sup>29</sup> Final Report of the Senate Select Committee on Work and Care, Recommendation 21.

ensure permanent part-time employees have access to regular, predictable patterns and hours of work. This could include implementing penalty rates for any hours worked over the contracted amount. For example, if an employee is contracted for 15 hours and their employer rosters them for more, they should be paid a penalty rate for hours worked beyond the contracted amount.”<sup>30</sup>

33. Workers should have as much certainty and predictability about their hours week-to-week as possible. Not having that certainty and predictability has negative impacts on their ability to manage their caring responsibilities outside of work; their economic security (impacting their ability to budget for essentials (including care), or secure a mortgage or rental property, for example); and to utilise workplace entitlements for fear of losing hours.
34. Our affiliates have identified many opportunities for improvement in specific awards relating to part time provisions, and their submissions to the job security stream and the work and care stream speak for themselves and address numerous award specific concerns. There are also recurring themes that reflect a need to address the following matters in many modern awards:
  - Providing security around patterns of hours that have become regular. For example, where additional hours are worked on a regular basis over 6 months, employees should have the right to elect to convert those additional hours to be part of their permanent ordinary contracted hours. There should be provision for 6 monthly reviews of part time hours to facilitate this.
  - Fairness and certainty on minimum engagements, including on a weekly basis for part time workers (for example a 15 hour minimum for part time employees in the awards that cover SDA members, as identified in the SDA submission).
  - Ensuring that prior to commencing employment, employees and employers agree in writing on a regular pattern of work including the days, hours and start/finish times.
  - Ensuring part time workers are paid overtime for working outside agreed hours.
  - Providing a process whereby employees who work hours that are “irregular, sporadic or unpredictable” are given an opportunity to express their interest in working hours which are regular and predictable, and an obligation on employers to provide such hours where operational requirements allow.

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<sup>30</sup> Final Report of the Senate Select Committee on Work and Care, Recommendation 25.

- Requiring employers to inform those employees when such hours were available to them (even if only on a temporary basis), and what payment they would attract.

### **Recommendation 2**

That the following matters are addressed in modern awards:

- Providing security around patterns of hours that have become regular. For example, where additional hours are worked on a regular basis over 6 months, employees should have the right to elect to convert those additional hours to be part of their permanent ordinary contracted hours. There should be provision for 6 monthly reviews of part time hours to facilitate this.
- Fairness and certainty on minimum engagements, including on a weekly basis for part time workers (for example a 15 hour minimum for part time employees in the awards that cover SDA members, as identified in the SDA submission).
- Ensuring that prior to commencing employment, employees and employers agree in writing on a regular pattern of work including the days, hours and start/finish times.
- Ensuring part time workers are paid overtime for working outside agreed hours.
- Providing a process whereby employees who work hours that are “irregular, sporadic or unpredictable” are given an opportunity to express their interest in working hours which are regular and predictable, and an obligation on employers to provide such hours where operational requirements allow.
- Requiring employers to inform those employees when such hours were available to them (even if only on a temporary basis), and what payment they would attract.

### **Question 2 – Flexibility**

35. Despite the discussion paper engaging in a broad discussion about flexible working arrangements, question 2 focuses solely on whether changes are required to individual flexibility agreement provisions in modern awards. Whilst we deal with this question below (consistent with the ACTU submission to the job security stream of the Review), we also submit that there are other variations that could be made to awards to provide for stronger access to flexible work arrangements.

#### **Individual Flexibility Arrangements**

36. The General Managers’ Reports into Individual Flexibility Arrangements (IFAs) have found that there is a lack of data concerning these arrangements.<sup>31</sup> This is hardly surprising given that the

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<sup>31</sup> General Manager’s report into the extent to which individual flexibility arrangements are agreed to and the content of those arrangements (2009-2019) at p 2; General Manager’s report into individual flexibility arrangements under s. 653 of the Fair Work Act (2015-2018) at pp8-9; General Manager’s report into individual flexibility arrangements under s.653 of the Fair Work Act (2012-2015) at p 10 & 1; General Manager’s report into individual flexibility arrangements under s.653 of the Fair Work Act (2015-2018) at p iv, 8; ; General Manager’s report into individual flexibility arrangements under s.653 of the Fair Work Act (2018-2021) at p vi & 8.

design features of the legislative scheme provide for poor oversight of IFAs. That these instruments are made and operate in the shadows, even when made in contravention of the provisions that authorise them, is one of the major failings of the Fair Work system and is out of step with its general architecture.

37. In addition, the methodology used in the General Manager's reports has not been stable throughout the report series. Notwithstanding these limitations, the General Manager's reports are, to date, the best source of data one is likely to find on IFAs, and some concerning findings emerge. These include:

- In the 2009-2012 report:
  - Sample IFAs provided showed efforts to develop all in rates, suspend overtime without a change in the rate of pay, and suggestions that employees would not be allocated shifts unless they agreed to the IFA.<sup>32</sup>
  - Employers perceiving the leading benefits of IFAs as increased flexibility with rostering, and staff working more or less hours as needed by the employer and reduced costs.<sup>33</sup>
  - Between 17 -27% of employers surveyed who made an IFA did not conduct a BOOT assessment.<sup>34</sup>
- In the 2012-2015 report:
  - A quarter of surveyed employers who made more than one IFA in respect of modern awards required employees to accept those IFAs as a condition of commencing employment.<sup>35</sup>
  - Around half of the surveyed employers that made more than one IFA reported that all of their IFAs varied the same conditions<sup>36</sup>, suggesting template arrangements rather than genuine efforts to meet employee needs.
  - Only 12.4% of surveyed employers who entered into IFAs considered that those IFAs improved their employees' job security.<sup>37</sup>
  - 42% of employers surveyed that made an IFA did not document how an employee was better off under the arrangement.

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<sup>32</sup> At p75-76

<sup>33</sup> At Table 5.10

<sup>34</sup> At Tables 5.5 & 5.7.

<sup>35</sup> At Table 5.7

<sup>36</sup> At page 32

<sup>37</sup> At Table 6.5

- Around 14% of employees surveyed who entered into an IFA indicated that they had sacrificed pay or conditions through their IFA, including 28.7% of those employees working part time hours and 46.5% of the employees engaged as casuals.<sup>38</sup>
- In the 2018-2021 report:
  - The most common reason revealed by survey participants for entering into an IFA was to “change an employee’s hours of work and to address issues with overtime and penalties that result from the change.”<sup>39</sup>
  - Examples were provided where IFAs were offered to avoid paying penalty rates in response to shift patterns first requested via request for flexible working arrangements under section 65.<sup>40</sup>
  - A survey conducted by the Commission indicated that IFAs were mostly signed by women.<sup>41</sup>

38. The 2015-2018 report did not include any detailed examination or inquiry into the content of the IFAs made by the participants or report on the reasons employers initiated IFAs.

39. The general impression of misuse of IFAs to employees’ disadvantage is reflected in the interactions between our affiliates and their members, including IFAs being presented as a fait accompli and loss of work opportunities where IFAs are questioned or refused.

40. Given the evidence of misuse of IFAs, often to undermine job security and conditions, we call for legislative reform to remove individual flexibility provisions from modern awards.

**Recommendation 3**

That the Commission note in its report the ACTU view that individual flexibility arrangements have been inconsistent with the new modern award objective and should not be required or permitted in modern awards.

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<sup>38</sup> At Page 37-38

<sup>39</sup> At Page 13

<sup>40</sup> Ibid.

<sup>41</sup> Discussion paper at [125].

41. The matters which are within the scope of the current Individual Flexibility term include those which most directly engage with the regularity and predictability in hours of work and income. Notably, the most recent report of the General Manager into individual flexibility arrangements<sup>42</sup> suggests that IFAs dealing with changes to start times, finish times, shifts and days worked were the most common among the sample of employers and employee and employer representatives participating.<sup>43</sup> The disjuncture between the incidence of IFAs dealing with those matters and those dealing with overtime and penalties is consistent with one of the “most common reasons for initiating an IFA” being identified in that report as “allowing part time employees to take extra shifts at their own request, without the employer having to pay them overtime”<sup>44</sup>. Having regard to the observations made by the Commission concerning the interaction of “preferred hours arrangements” with the Better Off Overall Test<sup>45</sup>, this is a cause for concern.
42. In our view, there is scope for enhancing employees’ capacity to choose to enter into work that provides regularity and predictability in hours of work and income through adjustments to the Individual Flexibility Term.
43. The first such adjustment would be one of form rather than substance. Currently, the standard term informs readers that the right to make an individual flexibility agreement is additional to other award based rights, but does so only in the last subclause. In our view, the intent of this provision might be more readily achieved if it were relocated as the first subclause and supplemented so that it also alerted readers to the NES right to request a flexible working arrangement.
44. The second adjustment we recommend involves requiring, for employer-initiated proposals for an IFA, that some consideration or indication be given regarding whether regularity and predictability in hours of work or income would be enhanced or not by entering to a proposed IFA. An opportune way of giving effect to this would involve providing greater clarity around what a “proposal”, as referred to in subclause 4(a) of the standard clause, would involve. Ideally, the proposal should include:
- a. a draft of the proposed IFA; and
  - b. a statement to the effect that the employee is free to:
    - choose to agree or not agree to the proposal;

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<sup>42</sup> [General Manager’s report into individual flexibility arrangements under s.653 of the Fair Work Act 2009](#), Fair Work Commission, 2021.

<sup>43</sup> Table 5.4.

<sup>44</sup> At page 13.

<sup>45</sup> [2013] FWCFB 2170 at [121]-[136]

- discuss, seek advice or be represented in relation to the proposal; and
- put forward an alternative.

45. Moreover, it should (and the final form of the IFA also should) set out whether the employer expects that the IFA will result in any improvement to the regularity and predictability of the employees work and income. For the avoidance of doubt, we make these suggestions as additions to rather than substitutions for setting out the matters referred to in subclause 6 of the standard term.

46. The use of the existing standard clause may result in disagreements between employees and employers about whether a proposal would, if agreed to, actually result in the employee being better off overall. If our suggestions are adopted, there may also be disagreements as to the accuracy of the assessment that an IFA would or would not enhance regularity and predictability of income. Such disagreements would in our view be properly characterised as disputes “about a matter arising under this award” for the purposes of the standard dispute resolution term. It would be helpful if the capacity to utilise the dispute resolution provision for these purposes was highlighted either in the standard IFA term or in a note beneath it. Such amendments, which would ideally refer to the Commission’s capacity to conduct conciliation, mediation, express an opinion or make a recommendation, would additionally assist to resolve some outstanding issues from the last substantive consideration of the flexibility clause, without running the risk of imposing a requirement that Commission actually approve or consent to the terms of an IFA.<sup>46</sup>

47. A final issue worthy of consideration in our view relates to the options for exiting from an IFA if it no longer ensures that the employee is better off overall, or if the employer’s expressed expectations concerning improvements to regularity and predictability of hours and income have been not fulfilled. We accept that the IFA scheme was not initially designed to provide any future guarantee as to the suitability of an IFA that was compliant when made, however the same is true of enterprise agreements. Opportunities now exist to review enterprise agreements where circumstances have changed, via section 227A of the FW Act. We would be keen to explore whether a simplified mechanism could be adapted from the model provided by section 227A, which would permit the FWC to express an opinion about whether the BOOT continued to be met or any expectations concerning improvements to regularity and predictability of hours and income have been realised. Such a process would not of its own set aside an IFA which was not meeting

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<sup>46</sup> [2013] FWCFB 2170 at [189]-[202]



an employee's needs or was non-compliant, but may prompt or reassure either or both of the parties to it to exercise their rights to exit from the IFA in circumstances when they otherwise may be reluctant to do. This would at least limit the damage brought about by deficient IFAs, rather than relying on the wholly unsatisfactory enforcement provisions which deem non-complaint IFAs to be a breach of the flexibility term in the award yet allow them to continue to operate to an employee's disadvantage.

48. We note that Recommendation 24 of the Senate Select Committee on Work and Care, concerning reporting on flexible working arrangements, could in part be given effect to by variations to the standard term. We are concerned however that this would be a sub-optimal solution as it would not provide a uniform system of reporting between individual flexibility arrangements made under awards and those made under enterprise agreements. A legislative change would be a more effective method of implementation.

#### **Recommendation 4**

If Individual Flexibility Arrangements are to be retained in modern awards, the Commission should vary the standard term for individual flexibility arrangements by:

- Relocating the final subclause of the standard term as the first and supplementing it to alert readers to the NES right to request a flexible working arrangement;
- Ensuring that an employer's "proposal" for an IFA includes a draft of the IFA;
- Ensuring that an employer's "proposal" for an IFA includes a statement to the effect that the employee is free to choose agree or not agree to the proposal; discuss, seek advice or be represented in relation to the proposal; and put forward an alternative;
- Ensuring that an employer's "proposal" for an IFA, and any IFA made, states the employer's assessment as to whether the IFA will result in any improvement to the regularity and predictability of the employee's work and income;
- Referring to the capacity to bring disputes under the dispute resolution procedure and to the Commission's power to make conciliate, mediate, express an opinion or make a recommendation; and
- Providing a capacity for the Commission to review an IFA and express an opinion about whether it continues to meet the BOOT and whether any expectations concerning improvements to regularity and predictability of hours and income had been realised.

#### **Recommendation 5**

That the Commission invite parties to consider seeking variations to awards to require reporting on individual flexibility agreements, only in the event that the government indicates that it does not intend to legislate to abolish IFAs or require reporting in both awards and enterprise agreements.

## Flexible Working Arrangements

49. The discussion paper outlines how flexibility in working arrangements assists carers to balance care responsibilities with paid work, ease time pressures and enable workers to better meet personal and family responsibilities.<sup>47</sup> Further, women who have greater access to flexible start and finish times before having children are more likely to remain employed after having children, and when flexible work is not available, people providing care to older people or people with disability are more likely to leave the workforce altogether.<sup>48</sup> The top reason women who want to work are unable to is, 'caring for children.'<sup>49</sup> After the age of 35, women are at least three times as likely to work part time than men,<sup>50</sup> demonstrating the need for stronger rights to flexible working arrangements in order to encourage a fairer sharing of caring responsibilities by men, and to prevent women being forced into insecure work at the crucial moment when they take on caring responsibilities.
50. A large percentage of requests for access to family friendly working arrangements are refused, either in whole or in part. In addition, a high proportion of employees who need flexibility (many of whom are men) do not ask at all.<sup>51</sup> Men are more reluctant than women to request flexible working arrangements and are less likely to be granted such requests<sup>52</sup> - a significant barrier to work and care being shared more equally between men and women, and reducing the disproportionate burden of unpaid care on women.
51. Workers need flexibility to balance work and caring responsibilities. But this cannot come at the expense of secure working arrangements. The Work and Care Final Report acknowledged that a lack of flexibility drives many working carers into insecure forms of work, which further limits their ability to access flexible arrangements. It also acknowledged that some employers may misuse the term 'flexible' to describe insecure, unpredictable and ad hoc employment arrangements.<sup>53</sup>
52. It is not only possible for work to be both flexible and secure<sup>54</sup>, it is essential to ensure that women and workers with caring responsibilities are not disadvantaged, and that awards continue to meet the Modern Awards Objective. The Women's Economic Equality Taskforce recommended in its

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<sup>47</sup> Discussion paper at [105]-[106].

<sup>48</sup> Discussion paper at [106].

<sup>49</sup> ABS Barriers and incentives to labour force participation (FY 2022-2023)

<sup>50</sup> ABS Labour Force, January 2024

<sup>51</sup> Professor Jill Murray, Family Friendly Provisions: Report to the Fair Work Commission, 4 May 2017 <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/expert-jill-murray.pdf>

<sup>52</sup> Ibid.

<sup>53</sup> Senate Select Committee on Work and Care, Final Report (March 2023) [6.59]–[6.60].

<sup>54</sup> Ibid [6.61]

Final Report that more needs to be done to provide good, secure jobs for women and the availability of high quality flexible work (rather than precarious forms), and to address insecure work.<sup>55</sup>

53. Whilst the right to request flexible working arrangement provisions under the FW Act have recently been strengthened by the *Fair Work (Secure Jobs Better Pay) Act 2022* (SJBPA Act), they still have several limitations. They are only available on certain grounds and after 12 months of employment, employers can refuse them on the basis of 'reasonable business grounds', and workers have no right to revert to previous hours after a period of reduced hours.
54. These limitations mean that there still significant barriers that exist for employees who need access to flexible work for various reasons, including to balance their work and family responsibilities. Access to stronger flexible work arrangements will improve the nature and quality of labour force participation for parents and carers, and assist in achieving gender equality.
55. The ACTU's proposed variations below are aimed at ensuring that the employment safety net promotes gender equality and flexible modern work practices; provides workplace conditions that facilitate women's full economic participation; and meaningfully assists employees to balance their family and work responsibilities by providing for flexible working arrangements.

*All workers should have access and there should be no waiting period*

56. Flexible working arrangements are only available to certain cohorts of workers rather than to all workers. Further, the definition of 'carer' in s65 of the FW Act is limited to carers recognised as such under the Carers Recognition Act – an unduly narrow definition which excludes many workers with caring responsibilities.
57. It is clear that there are significant workplace penalties associated with being a carer and having caring responsibilities. Evidence from Carers NSW and the ABS indicates that carers are less likely to be employed full time; less likely to work in industries or occupations with limited flexibility; more likely to experience workplace discrimination; less likely to have professional development opportunities, more likely to reduce their working hours; and more likely to change job or stop working altogether.<sup>56</sup>

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<sup>55</sup> Women's Economic Equality Taskforce (2023) 'A 10 year plan to unleash the full capacity and contribution of women to the Australian Economy 2023-2033.' Accessed online at [Women's Economic Equality Final Report \(pmc.gov.au\)](https://pmc.gov.au/women-economic-equality-final-report)

<sup>56</sup> Discussion Paper at [74].

58. It is arbitrary and unfair for an employee to have to wait 12 months before being able to request flexible working arrangements, and acts as a disincentive for workers to change jobs (and thereby have access to pay increases and promotions). It is also a disincentive for women returning to the workforce (but not to the same job they had prior to parental leave) – the inability to request flexible work for 12 months may mean they are not able to return to the workforce at all. Given research demonstrating how prevalent discrimination against pregnant women and women returning to work after parental leave is<sup>57</sup>, removing eligibility based on length of service would help women to return to the workforce where they have been discriminated against and would increase female workforce participation.
59. Other countries now have experience of different approaches to flexibility and their higher rates of labour participation attest to their positive benefits. The UK for example has made the right to request flexibility available to all employees, without any waiting period. It aims to maximise workforce participation and de-stigmatise the utilisation of flexible arrangements, especially for men and fathers.<sup>58</sup>
60. In order to make flexible working arrangements a normal and accepted part of working life and to ensure that men and women can contribute more equally to paid and unpaid work, a variation to awards to make the right to request flexible work available to all workers (regardless of length of service or the reason) is necessary. This would remove the stigma attached to its use when confined mostly to carers<sup>59</sup>, and help to normalise and mainstream flexible work across industries and workplaces. We note Recommendation 3 of the Work and Care Interim Report called for this change.
61. In the alternative, and at the very least, flexible working arrangements should be available to more workers. It should be available to all workers with caring responsibilities, not just those within the meaning of the Carer Recognition Act. It should also be available to workers for reasons relating to their reproductive health.

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<sup>57</sup> AHRC research found that one in five mothers indicated that they were made redundant, restructured or dismissed, or that their contract was not renewed because of their pregnancy, their request for or taking of parental leave or because of their family responsibilities, breastfeeding or expressing on return to work: Australian Human Rights Commission (2014) Supporting Working Parents: Pregnancy and Return to Work National Review. A national study currently being undertaken by Dr Rachael Potter and colleagues at the University of South Australia found in its interim results that 18% of survey respondents on parental leave had their role permanently replaced: Potter et al. (2023). National Study on Parent's Work Conditions: Pregnancy, Leave and Return to Work Preliminary Results.

<sup>58</sup> Senate Select Committee on Work and Care, Interim Report (October 2022) at pxxi

<sup>59</sup> Ibid, and Recommendation 3.

62. Many workers, disproportionately women, require changes to working arrangements for reasons related to their reproductive health. For example, 20% of women experiencing menopause have severe symptoms that can range from extreme fatigue, recurrent migraines, anxiety, and other physical and mental health concerns which significantly affect them at work. Menopausal workers are generally highly skilled and experienced, but many feel forced to leave work because of menopausal symptoms despite the fact many symptoms can be managed effectively through the making of reasonable adjustments and access to flexible working arrangements. This contributes to lower rates of workforce participation for women. Given how these issues disproportionately affect women and their participation in work, the inclusion of reproductive health as a standalone circumstance is justified and has the potential to significantly improve women’s workforce participation.
63. Finally, there are inherent limitations in individual rights mechanisms, especially in family unfriendly workplaces. Workers should have the right to bring collective requests and disputes in relation to flexible work.

**Recommendation 6**

Awards should be varied to make the right to request flexible work available to all workers (regardless of length of service or the reason). There should also be a collective right for groups of employees to request flexible work and to bring collective disputes regarding flexible work.

In the alternative, award variations should be made to ensure that flexible work arrangements are available to more workers as follows:

- Expand the definition of carer to include all workers with caring responsibilities, not just those within the meaning of the Carer Recognition Act; and
- Allow employees to request flexible working arrangements for reasons relating to their reproductive health.

*Reasonable Business Grounds*

64. The ‘reasonable business grounds’ on which employers can refuse requests for flexible working arrangements are far too broad, give employers far too many opportunities to refuse requests, and place a number of obstacles in the way of workers who need flexibility. The continued availability of these grounds to refuse requests undermines the intent and impact of the recent changes to flexible work brought about by the SJBPA Act. In some industries such as healthcare, it can be almost impossible for workers to get flexible working arrangements due to the employer’s claims regarding the impact on service delivery.

65. The FWC should apply an objective and narrower test within awards. Awards should be varied so employers are required to reasonably accommodate flexible working arrangements unless it causes them unjustifiable hardship. This would mean employers could only refuse flexible working requests on the basis of 'unjustifiable hardship' rather than on 'reasonable business grounds.' This is an objective and more rigorous test which is well understood, and will not allow employers to dress up inconvenience as a reasonable business ground and hence a reason to reject requests for flexible working arrangements. This variation would bring the provision in line with concepts under anti-discrimination law and enable many more workers to access flexible work. We note that this variation is consistent with Recommendation 3 of the Interim Report of the Senate Select Committee.
66. This change would 'shift the dial' to create a presumption in favour of the employer granting the employee's proposal. This would better support working parents and carers by encouraging the development of flexible modern work practices which benefit everyone.

**Recommendation 7**

Awards should be varied so that employers are required to reasonably accommodate flexible working arrangements unless it causes them unjustifiable hardship.

*Right to revert*

67. Workers who request reduced hours or part time work to accommodate their caring responsibilities have no ability to return to their former working hours when their circumstances change. This means women are likely to become stuck in part time work, and have no ability to increase their hours unless the employer offers , meaning workers depend on their goodwill and luck.
68. Workers with parenting responsibilities who have reduced their hours should have a right to revert to their former working hours up until their child is school aged (or later by agreement). Workers with caring responsibilities who have reduced their hours should have a right to revert to their former working hours for a period of two years from the date they commence their reduced hours (or later by agreement).
69. This would provide employees who need to reduce their paid working hours to accommodate parenting and caring responsibilities with job security and a right to revert to their former working hours so as to avoid the occupational downgrading associated with reduced hours.

### **Recommendation 8**

Awards should be varied to allow workers with caring responsibilities to revert back to their former working hours following a period of part time or reduced hours of work.

### **Question 3 – Facilitative provisions**

70. Facilitative provisions enable agreement at an enterprise level to determine the way that an award clause is applied at the enterprise. They normally provide that the standard approach in an award provision may be departed from by agreement between an individual employer and an employee, or the majority of employees in the enterprise or part of the enterprise concerned.<sup>60</sup>

71. Several issues for consideration arise from the discussion paper. Firstly, the procedural requirements for forming an IFA under the model clause, such as that employees must be better off overall, do not apply to facilitative provisions (although they may encompass safeguards or impose restrictions in relation to the agreement). Secondly, the changes made through such clauses are not subject to scrutiny by the Commission. Thirdly, the nature and extent of the facilitative provisions in a particular award may not take into account the circumstances in the industry covered by the award and the history of any existing facilitative provisions. For example, in an industry in which employees have little or no bargaining capacity a more cautious approach may be warranted.<sup>61</sup>

72. Accordingly, awards should be varied to ensure that:

- Any agreements made under facilitative provisions must ensure that employees are better off overall.
- Some of the principles outlined by the Full Bench in the award modernisation process for the Hospitality Industry<sup>62</sup> should be incorporated into awards to clarify that:
  - Facilitative provisions are not a device to avoid award obligations, and should not result in unfairness to employees covered by the award;
  - To ensure that a facilitative provision operates fairly, the Commission may prescribe safeguards, which will depend on the nature of the provisions sought and the circumstances of the particular industry;

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<sup>60</sup> Discussion paper at [139].

<sup>61</sup> Discussion paper at [129], [133].

<sup>62</sup> (1999) AIRC P7500.

- The implementation of facilitative arrangements should be recorded in the time and wages records kept by employers pursuant to Division 1 of Part 9A of the Workplace Relations Regulations;
- The relevant unions are notified regarding the intention to utilise the facilitative provision and provide them with a reasonable opportunity to participate in negotiations regarding its use; and
- There be a monitoring process under which facilitative provisions are reviewed after a reasonable period to consider its impact in practice.

73. In addition, we submit that consideration should be given to how changes made through facilitative provisions can be subject to scrutiny by the Commission – perhaps, for example, through the preparation of regular reports regarding their use, similar to the reports the Commission prepares in relation to IFAs (but avoiding the shortcomings of those reports).

#### **Recommendation 9**

Awards should to be varied to ensure that:

- Any agreements made under facilitative provisions must ensure that employees are better off overall.
- The following principles be incorporated into awards to clarify that:
  - Facilitative provisions are not a device to avoid award obligation, and should not result in unfairness to employees covered by the award;
  - To ensure that a facilitative provision operates fairly, the Commission may prescribe safeguards, which will depend on the nature of the provisions sought and the circumstances of the particular industry;
  - The implementation of facilitative arrangements should be recorded in the time and wages records kept by employers pursuant to Division 1 of Part 9A of the Workplace Relations Regulations;
  - The relevant unions are notified regarding the intention to utilise the facilitative provision and provide them with a reasonable opportunity to participate in negotiations regarding its use; and
  - There be a monitoring process under which facilitative provisions are reviewed after a reasonable period to consider its impact in practice.

Further, consideration should be given to how changes made through facilitative provisions can be subject to scrutiny by the Commission – for example, through regular reports regarding their use.

#### **Question 4 – Working from home**

74. The latest ABS data shows 37% of Australian workers (including 60% of managers and professionals) were working from home on a regular basis in August 2023, up from around 32%



pre pandemic.<sup>63</sup> This is broadly consistent with the Productivity Commissions' estimate that 35% of jobs can be done from home.<sup>64</sup> Almost 40% of Australians said flexibility was their main reason for working from home.<sup>65</sup>

75. Recent research demonstrates the benefits to women, mothers, the economy and society, of working from home (WFH). A recent American paper<sup>66</sup> found that on average, a 10% increase in working from home is shown to increase mothers' employment by nearly 1% (relative to that of other women). This narrowing of the 'motherhood employment gap' was particularly noticeable for traditionally family unfriendly fields, such as finance and marketing. The authors found that these trends suggest that the rise of WFH transformed a broader set of jobs into more family-friendly occupations. Therefore, WFH increases labour supply and the workforce participation of women.<sup>67</sup>

76. New research from the Committee for Economic Development of Australia (CEDA)<sup>68</sup> has also demonstrated the benefits of WFH. Parents (especially women with children), people with a disability or health condition and carers have significantly increased their workforce participation in occupations that have made large transition to remote work since the pandemic.<sup>69</sup> Workforce participation in jobs where people could work from home increased by 8.5% for women with young children, and nearly 6% for people with a disability or health condition from 2019 to 2022. Workers with a greater need to work from home now have access to a broader range of jobs and opportunities<sup>70</sup>, and WFH has 'levelled the playing field.' The authors of the research and CEDA Chief Economist Cassandra Winzar conclude that these WFH outcomes are a "clear win for workers, employers and the economy, and can help the Federal Government achieve its vision of full employment."<sup>71</sup>

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<sup>63</sup> ABS Working Arrangements (August 2023). See also 28, 29. CEDA, 2024 Economic and Policy Outlook Report, Chapter 2 – 'WFH Debate must refocus on productivity', at p29.

<sup>64</sup> 30, Ibid, at p30.

<sup>65</sup> Ibid, Figure 3, at p31.

<sup>66</sup> Harrington, E and Kahn, M (31 October 2023) 'Has the Rise of Work-from-Home Reduced the Motherhood Penalty in the Labor Market?' [Accessed online](#) on 10 March 2024.

<sup>67</sup> Ibid.

<sup>68</sup> CEDA, 2024 Economic and Policy Outlook Report, Chapter 2 – 'WFH Debate must refocus on productivity'.

<sup>69</sup> Ibid, page 34.

<sup>70</sup> Ibid, at p33.

<sup>71</sup> Ibid, at p34; CEDA Media Release (22 February 2024) "Remote Work has boosted employment for parents and people with a disability."

77. WFH also has broader benefits, which include productivity and participation gains, deepens the pool of available workers with benefits for diversity and inclusion, mental health and employee engagement, reducing absenteeism and improving autonomy.<sup>72</sup>
78. Working from home provisions are not currently a feature of modern awards. Given the large numbers of employees who are working from home or who want to work from home, the clear benefits to all workers (but especially to women, carers and people with a disability or health condition), and the potential gains for productivity, workforce participation and diversity and inclusion, it is clear that modern awards in industries where work can be performed from home need to be varied to accommodate working from home arrangements in order to achieve the modern awards objective.
79. The ACTU and our affiliates propose that the relevant awards be varied to provide workers with the right to request work from home arrangements, with access to dispute resolution by the Commission, and the same requirements for employers in terms of responding to the request and the information they need to provide to employees. Similarly to what we propose for flexible working arrangements (acknowledging that working from home is another form of flexibility), the right should be available to all workers, regardless of their length of service or reason for requesting WFH arrangements. Employers should only be permitted to refuse a request on reasonable grounds. There should be clear, objective and industry-specific criteria in each relevant award to determine the reasonableness of a refusal.

**Recommendation 10**

Awards should be varied to provide workers with the right to request work from home arrangements on an individual and collective basis, with access to dispute resolution by the Commission, and the same requirements for employers in terms of responding to the request and the information they need to provide to employees as a flexible working request. The right should be available to all workers, regardless of their length of service or reason for requesting WFH arrangements. Employers should only be permitted to refuse a request on reasonable grounds. There should be clear, objective and industry-specific criteria in each relevant award to determine the reasonableness of a refusal.

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<sup>72</sup> CEDA, 2024 Economic and Policy Outlook Report, Chapter 2 – ‘WFH Debate must refocus on productivity’, p37-38.

### Question 5 – Right to disconnect

80. We note that, pursuant to Deputy President O’Neill’s comments during the Mention on 21 February 2024, this question will no longer be dealt with as part of this stream of the review. We further note the President’s Statement of 27 February 2024 which confirms that a major case to deal with the creation of the model award term and guidelines will commence shortly.

### Question 6 – Minimum payment periods

81. The discussion paper provides a good summary of the purpose and importance of minimum engagement periods, with reference to principles from key decisions.<sup>73</sup> These include the following:

- They are a necessary component of the award safety net for casual and part time employees.
- They protect employees from unfair prejudice or exploitation (and therefore meet the modern awards objective) by ensuring that they receive a minimum payment for each attendance at their workplace to justify the cost and inconvenience of each such attendance.
- Their rationale is to ensure that employees receive a sufficient amount of work and income for each attendance at the workplace to justify the expense and inconvenience associated with that attendance.
- Employment arrangements may become exploitative if the income provided for the employee’s labour (because of short engagement periods) is rendered negligible by the time and cost required to attend the employment.
- They are incentives for people to enter the labour market to take advantage of casual and part time employment opportunities, and engage the consideration in the modern awards objective at s134(c) regarding the need to promote social inclusion through increased workforce participation.

82. The discussion paper also explores the history and variation in minimum payment provisions across awards<sup>74</sup>, including observing that:

- They have been developed in an ad hoc fashion rather than having any clear founding in a set of general principles;
- They range from one hour up to four hours and vary depending on employment type or the type of work performed; and

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<sup>73</sup> Discussion paper at [156]-[161].

<sup>74</sup> Ibid at [159], [162].

- Whilst all modern awards provide for minimum payment periods for casuals, there are 9 modern awards that do not include minimum payment periods for part time employees working ordinary hours.

83. This issue was also raised by the Senate Select Committee into Work and Care, which recommended that in order to address pay equity and to stem the flow of workers out of the care sector, there should be a minimum shift call-in time across the care sector (for example, a four-hour minimum or another identified suitable minimum period).<sup>75</sup>

84. The importance of minimum payment periods to achieving the modern awards objective is well established.<sup>76</sup> Currently, there are inconsistent provisions in awards, including awards that don't provide for a minimum payment period at all.

85. This should be rectified by varying awards as follows (noting these variations are proposed as a model position or baseline entitlement across awards, noting that our affiliates might raise sector or occupation specific variations):

- Awards should provide for fairness and certainty on minimum engagements, including on a weekly basis for part time workers;
- There should be a four-hour minimum engagement period as a baseline entitlement for all employees (full-time, part-time and casual) except where indicated otherwise by affiliates for relevant awards, and excluding awards where there is a more generous entitlement that exists (ie it operates as a floor, not a ceiling). The four-hour minimum engagement should exclude any unpaid breaks.
- Minimum payment should apply where the rostered shift of a casual is cancelled.

**Recommendation 11**

Awards should be varied as follows:

- To provide for fairness and certainty on minimum engagements, including on a weekly basis for part time workers;
- To provide for a four hour minimum engagement period as a baseline entitlement for all employees (full-time, part-time and casual) except where indicated otherwise by affiliates for relevant awards, and excluding awards where there is a more generous entitlement that exists. The four hour minimum engagement should exclude any unpaid breaks.
- Minimum payment should apply where the rostered shift of a casual is cancelled.

<sup>75</sup> Senate Select Committee on Work and Care, Final Report (March 2023), Recommendation 15.

<sup>76</sup> 4 yearly review of modern awards – Casual employment and part-time employment [2017] FWCFB 3541 [399], [404].

## Question 7 – Span of hours

86. Span of hours clauses in awards are important because they provide the boundaries for a range of entitlements, such as rostering and overtime. They set the structure of hours ordinarily to be worked by employees, with work performed outside of those hours being compensated by way of a penalty such as overtime or shift allowances. This compensates employees for working at unsociable times which often clash with caregiving responsibilities. They can also have a role in determining when an employee is a shiftworker and thereby determine how much annual leave they are entitled to. They therefore have a material impact on an employee's pay and entitlements, as well as their work-life balance. They are also a critical consideration when reviewing the impact that Awards have on the ability for workers to manage their work and care arrangements because they impact on when a worker can be rostered. There are 6 awards identified in the discussion paper with no span of hours.<sup>77</sup>
87. In Awards with no span or a very broad span of hours, employees have very little control over being scheduled to work outside of standard weekday, daytime hours and also receive much lower compensation when they do work those hours as they are ordinary hours.
88. Awards that contain a broad span of hours (or indeed no span of hours) and include all 7 days as ordinary days of work, need to be addressed to provide some stability and certainty in when an employee can be rostered; to restrict when workers are expected to work; and to provide for appropriate compensation for working unsociable hours.
89. It is also a gender equality issue because male dominated awards are more likely to have a narrower spread of hours than female-dominated awards. A narrower span of hours (which many male dominated awards have the benefit of) places a restriction and protection against being rostered for evenings and/or weekends as ordinary hours. Hours worked outside the span must be agreed by the employee as they are overtime.
90. We refer to the submission of the SDA which provides a comparison between male dominated and female dominated awards and finds that there is a gendered impact of span of hours provisions. With the exception of the Nurses and Aged Care Awards which both have Monday-Friday 6am - 6pm (60 hours across the week), female dominated awards all have a more expansive span of hours (with some being significantly higher).

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<sup>77</sup> Discussion paper at [169].

91. The much larger span of hours for female dominated awards raises real concerns regarding how workers manage work and care, and gender equality outcomes. Span of hours provisions should be reviewed to ensure that Awards are meeting the Modern Awards Objective and are not contributing to the gender-based undervaluation of work.
92. Awards should be varied to contain a relevant span of hours and all awards currently containing a span which extends beyond standard weekday daytime hours should be reviewed with regard to the impact on a worker's right and ability to care, security of hours and rostering, and in relation to gender equality.

#### **Recommendation 12**

- Awards should be varied to contain a relevant span of hours and all awards currently containing a span which extends beyond standard weekday daytime hours should be reviewed with regard to the impact on a worker's right and ability to care, security of hours and rostering, and in relation to gender equality.
- Where Awards retain expansive span of hours, they should be reviewed to determine if they appropriately recognise and compensate for rostering outside of standard weekday daytime hours, e.g. with appropriate shift rates, allowances and leave.

#### **Question 8 – Rostering**

93. Our affiliates report that current rostering provisions have multiple negative impacts on workers and the balancing of work and care responsibilities. Rostering provisions mean that workers have a lack of control over their hours of work, changes to their rostered hours, and their ability to take their accrued leave entitlements. These issues are exacerbated by limited access to affordable and quality early childhood education and care; the impact of precarious, insecure and casual work on low paid and women workers; and the use of punitive rostering to discriminate against workers with caring responsibilities and pregnant workers.
94. These issues were acknowledged by the Work and Care Final Report which found that workers (especially in the care sector) experience unfair rostering practices. These included variable hours, unexpected schedule changes, disruptive rostering, lack of genuine consultation with workers, no capacity to reject changes to working hours, all of which negatively affect employees' caring responsibilities and place stress on workers and their families.<sup>78</sup> The Final Report also found that

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<sup>78</sup> Discussion paper at [150]-[151]; Senate Select Committee on Work and Care, Final Report (2023) at pp112–117.

inflexible scheduling and low pay together have an adverse impact on time, financial and personal resources for care.<sup>79</sup>

95. As a result, the Work and Care Interim Report recommended that rostering practices should be predictable, stable and focused on fixed shift scheduling.<sup>80</sup> The Work and Care Final Report recommended that employers should be required to give advance notice of at least two weeks of rosters and roster changes (except in exceptional circumstances); that there should be genuine consultation with employees on roster changes to accommodate their needs; and that employees have a right to say no to extra hours with protection from negative consequences.<sup>81</sup>
96. There are a broad range of roster notification periods in modern awards, ranging from 48 hours to 14 days. Provisions for making changes to rosters are similarly varied and range from 24 hours notice to 7 days notice.<sup>82</sup> Notice periods for rosters can play a crucial role in work and care planning, with a regular schedule the most common working arrangement change sought by new parents.<sup>83</sup>
97. All awards include a model consultation clause about changes to rosters or hours of work, which requires employers to consult on proposed changes to the regular roster or ordinary hours of work of an employee, other than an employee working hours that are irregular, sporadic or unpredictable. The consultation requirements include consulting with affected employees and their representatives by providing them with information about the proposed change and inviting employees to provide their views about the impact of the proposed change. The employer must then consider any views about the proposed change. Provisions do not require parties to reach a mutually agreed position before the change is made.<sup>84</sup> Recommendation 5 of the Work and Care Interim Report highlighted the importance of employers genuinely considering employee views about the impact of proposed roster changes and taking their views into account when changing rosters and other work arrangements.<sup>85</sup>
98. There is a clear need for better rights for all workers to secure, certain, stable and meaningful rosters that provide job security and accommodate caring responsibilities. Workers need to have more control over their hours of work, changes to their rostered hours, and the ability to access

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<sup>79</sup> Discussion paper at [152].

<sup>80</sup> Senate Select Committee on Work and Care, Interim Report (October 2022), at p 110, Recommendation 5.

<sup>81</sup> Senate Select Committee on Work and Care, Final Report (2023) Recommendation 21

<sup>82</sup> Discussion paper at [178].

<sup>83</sup> Ibid at [177].

<sup>84</sup> Ibid at [173]-[175].

<sup>85</sup> Senate Select Committee on Work and Care, Interim Report (October 2022) Recommendation 5

their accrued leave entitlements. Short notice periods for rosters and roster changes should be avoided.

99. Awards should be varied to ensure that:

- All workers have access to regular, predictable patterns and hours of work.
- Advance notice of 28 days of rosters is given except in exceptional circumstances (subject to any affiliate submissions that propose a different timeframe).
- Roster changes can be made by mutual agreement only. In the alternate, there should be 28 days' notice of roster changes for all workers, including casuals (except in exceptional circumstances), and a requirement for employers to genuinely consider employee views about the impact of proposed roster changes, and take the views of the employee, including working carers, into consideration when changing rosters and other work arrangements.
- Employees have a 'right to say no' to extra hours with protection from negative consequences.
- There is a positive obligation to provide employees with rosters that accommodate caring responsibilities (Right to Care Roster Clause).
- Workers can bring rostering disputes to the FWC for conciliation and arbitration, and have the status quo apply until the matter is resolved.

**Recommendation 13**

Awards should be varied to ensure that:

- All workers have access to regular, predictable patterns and hours of work.
- Advance notice of 28 days of rosters is given except in exceptional circumstances (subject to any affiliate submissions that propose a different timeframe).
- Roster changes can be made by mutual agreement only. In the alternate, there should be 28 days' notice of roster changes for all workers, including casuals (except in exceptional circumstances), and a requirement for employers to genuinely consider employee views about the impact of proposed roster changes, and take the views of the employee, including working carers, into consideration when changing rosters and other work arrangements.
- Employees have a 'right to say no' to extra hours with protection from negative consequences.
- There is a positive obligation to provide employees with rosters that accommodate caring responsibilities (Right to Care Roster Clause).
- Workers can bring rostering disputes to the FWC for conciliation and arbitration, and have the status quo apply until the matter is resolved.

100. In addition (and consistent with the ACTU's submission to the job security stream of the review), the standard term concerning consultation about changes to regular rosters or ordinary hours of



work should be varied to specify that the information about the change which the employer is to provide must include information about whether the change is expected to be permanent or temporary, and if the latter - its duration. Such information should include information about the effect of the change on the employees' earnings. Both of these are critical to enable the employees to participate in the consultation in an informed way and to thereby exercise some influence or choice over matters affecting their job security.

101. We note that the *Textile, Clothing, Footwear and Associated Industries Award* requires information concerning changes to regular rosters or ordinary hours of work to be provided "...in a manner which facilitates employee understanding of the proposed changes, having regard to their English language skills". Whilst it may be accepted that the particular industry in which that award operates has a high density of workers from a non-English speaking background, it seems to us that genuine participation in consultation and the genuine facilitation of choice requires some effort to ensure that a proposition being put to an employee is comprehensible, irrespective of the industry they work in.

102. The standard term concerning consultation about changes to regular rosters or ordinary hours of work should be varied to:

- ensure that the information provided by the employer about a proposed change includes information about whether the change is expected to be permanent or temporary (and, if the latter, its duration) and the expected effects of the change on employees' earnings; and
- ensure that the information provided by the employer about a proposed change is provided in writing and in a manner which facilitates employee understanding of the proposed changes, having regard to their English language skills.

**Recommendation 14**

The standard term concerning consultation about changes to regular rosters or ordinary hours of work should be varied to:

- ensure that the information provided by the employer about a proposed change includes information about whether the change is expected to be permanent or temporary (and, if the latter, its duration) and the expected effects of the change on employees' earnings; and
- ensure that the information provided by the employer about a proposed change is provided in writing and in a manner which facilitates employee understanding of the proposed changes, having regard to their English language skills.

### Question 9 – Availability and guaranteed regular hours

103. Only 2 of the 25 awards examined in the discussion paper specifically prohibit employers rostering an employee to work outside their nominated available hours. These awards specify that upon engaging part-time employees, the employer is required to agree with the employee their guaranteed number of hours of work each week as well as the times the employee is available to work the guaranteed hours. While employers may roster a part-time employee to work in excess of their guaranteed hours under these awards, they cannot roster the employee to work outside the employee’s nominated availability.<sup>86</sup> Some awards also impose restrictions on employers requiring part-time employees to perform work in excess of their guaranteed hours or outside of their agreed ordinary hours, except by agreement or with the payment of overtime.<sup>87</sup>
104. Some awards provide part time employees who have regularly worked in excess of their guaranteed hours for a period of at least 12 months, with a right to request that the employer increase their guaranteed hours to match their regular work pattern. <sup>88</sup> We note that Recommendation 2 of this submission deals with providing security around patterns of hours that have become regular, as well as proposals for employees who work hours that are “irregular, sporadic or unpredictable.”
105. The use of low hour contracts or base rosters with fluctuating additional hours is a significant problem in many industries, and is compounded by large span of hours provisions, where workers can be rostered to work ordinary hours across the whole week and late into the evening. To address these issues and protect working carers from being rostered when they are undertaking caring responsibilities, awards should be varied to:
- require employees to agree a guaranteed number of hours each week with the employee, and the time the employee is available to work those hours.
  - Restrict an employer’s ability from requiring employees to work outside of their agreed available hours, except with some form of penalty such as the payment of overtime.
  - Ensure employees have written records of their engagement and agreed hours

#### **Recommendation 15**

Awards should be varied to:

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<sup>86</sup> Discussion paper at [179].

<sup>87</sup> Ibid at [180].

<sup>88</sup> Ibid at [181].

- require employees to agree a guaranteed number of hours each week with the employee, and the time the employee is available to work those hours.
- Restrict an employer's ability from requiring employees to work outside of their agreed available hours, except with some form of penalty such as the payment of overtime.
- Ensure employees have written records of their engagement and agreed hours

## Question 10 – Overtime, TOIL, make up time and the 38 hour working week

### Overtime

106. Overtime provisions are designed to compensate employees performing work outside of their ordinary or rostered hours. The payment of overtime depends on interactions between ordinary and guaranteed hours, the span of hours, days worked, type of employment and other award provisions.<sup>89</sup> A narrow span of hours (more commonly found in awards covering male dominated industries) means that overtime is payable on more hours than in awards with a large span of hours (more commonly found in awards covering female dominated industries).
107. The variation in overtime provisions across awards has a very gendered impact. For example, in road transport and manufacturing, the requirement to pay overtime on any additional hours means there is a disincentive to employers offering low hour contracts that can be flexed up without penalty. There is no such requirement in aged care, meaning an employer can offer a low hour contract and then offer employees more hours week to week paying ordinary hour rates. This means that low hour contracts that can be 'flexed up and down' are used in female dominated industries, rather than employers being incentivised to offer ongoing additional hours to avoid paying overtime rates.<sup>90</sup>
108. By way of illustration, in the Building On-site Award and the Electrical Contracting Award (both awards applying to male dominated industries), all hours of work beyond ordinary hours are payable as overtime for all employees (clause 29 and clause 20). By contrast, in the Aged Care Award, overtime is only payable for part time or casual employees when they work in excess of 38 hours per week or 76 hours per fortnight (clause 25). This is a clear problem which needs to be rectified to ensure all awards are meeting the modern awards objective, in particular the considerations contained in s134(1)(aa),(ab), (c) and (da).

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<sup>89</sup> Discussion paper at [183], [185]

<sup>90</sup> Ibid at [184]; Senate Select Committee on Work and Care, Final Report (March 2023), 89–90

**Recommendation 16**

Awards should be varied to ensure that overtime is paid on all additional hours worked outside of ordinary hours for casual, part time and full time employees.

**Time off in lieu (TOIL)**

109. Time off instead of payment for overtime provisions are provided for in all modern awards by written agreement between an employer and employee.<sup>91</sup> However TOIL entitlements are calculated differently in different awards. The discussion paper notes that in 16 of the 25 modern awards examined, an employee's entitlement to time off is equivalent to the overtime payment that would have been made (e.g. 60 minutes of overtime is worked at 150 per cent of the minimum hourly rate, this would result in 90 minutes of time off). However, in 9 awards, an employee's entitlement to time off is equivalent to actual time worked (e.g., 2 hours of overtime worked equals 2 hours' time off).<sup>92</sup> The second category of awards is detrimental and unfair to workers both because they receive a lesser entitlement, and because they can be pressured and exploited to take TOIL rather than be paid overtime, as it is the cheaper option for the employer. We refer to the HSU submission which details the employer practice of exploiting this inequity by imposing on workers a policy of taking TOIL instead of making overtime payments so as to avoid having to make overtime payments.
110. This is an issue that needs to be rectified so that TOIL provisions provide that an employee's entitlement to time off is equivalent to the overtime payment that would have been paid, rather than the actual time worked. Such a variation is necessary to ensure that all awards meet the modern awards objective, in particular the considerations contained in s134(1)(aa),(ab), (c) and (da).

**Recommendation 17**

Awards should be varied so that TOIL provisions provide that an employee's entitlement to time off in lieu is equivalent to the overtime payment that would have been paid, rather than the actual time worked.

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<sup>91</sup> Discussion paper at [190].

<sup>92</sup> Ibid at [191].

### Reasonable additional hours and the 38 hour working week

111. We note the observations in the discussion paper regarding reasonable additional hours and the evidence presented to the Work and Care Senate Committee that suggested many employees do not have the option to decline shifts even at very short notice, and are pressured into taking on additional hours to meet service and operational gaps.<sup>93</sup> As a result, Recommendation 21 of the Work and Care Final Report included that awards ensure employees have a ‘right to say no’ to extra hours with protection from negative consequences.
112. We note also the discussion regarding the four-day working week at [146]-[148] of the discussion paper. Evidence provided to the Work and Care Senate Committee regarding global and domestic trials to reduce the number of working hours concluded that shorter working hours reduce the scope for work-life conflict by providing more scope to manage family and other personal responsibilities outside work hours, support greater gender equality in employment participation, improve health and wellbeing, normalise care as part of work, improve productivity, and produce environmental and cost savings gains.<sup>94</sup> The Work and Care Final Report found that a reduced working week may trigger a positive redistribution of paid and unpaid work between genders.<sup>95</sup>
113. We note that our affiliates are pursuing various claims in relation to the issue of workers’ share of time and ways to effectively reduce working hours. These include shorter working weeks without loss of pay, decreasing hours worked through rostering adjustments and fairer rostering, and increased annual leave. We refer also to specific affiliate submissions to this review in this respect.
114. We submit there is significant merit in looking at these issues further, and consistent with the Recommendations 22 and 27 of the Work and Care Final Report, we recommend the Commission include in its report a recommendation that there be a review of standard working hours, the extent and consequences of longer hours of work, stronger penalties for longer hours, and ways to effectively reduce working hours.

#### **Recommendation 18**

The Commission include in its report a recommendation that there be a review of standard working hours, the extent and consequences of longer hours of work, stronger penalties for longer hours, and ways to effectively reduce working hours.

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<sup>93</sup> Ibid at [196].

<sup>94</sup> Ibid at [146].

<sup>95</sup> Ibid at [147]; Senate Select Committee on Work and Care, Final Report (March 2023) at pp129–133

### Question 11 – On call and recall to duty

115. We note and agree with the findings in the Senate Work and Care Report that the expectation to remain on-call and available for extended periods of time (including on sleepover shifts) in order to secure sufficient paid work can have a profound impact on the ability to manage work and care effectively and to be able to disconnect from the workplace.<sup>96</sup>
116. Being on call is compensated in 5 of the 25 modern awards examined in the discussion paper. Once again, gendered differences are stark – awards covering male dominated industries such as the Road Transport and Distribution Award and the Vehicle Award require that ordinary rates are payable for employees required to standby for duty, while awards covering female dominated industries such as the Nurses Award and the SCHADs Award only provide for a daily or weekly allowance for being on call,<sup>97</sup> which results in far less compensation for this type of work.
117. Sleepover work is also poorly valued (where employees are required to be present at the workplace at the employer’s direction, and are responsible for patients, residents and/or clients who may require support overnight). Most awards that provide for sleepover work provide a mixed payment type, generally being a monetary allowance for the sleepover that includes payment for any necessary work up to 1 or 2 hours (varies by Award). Any work performed that is excess to this entitlement is generally paid at overtime rates. Some awards pay a higher sleepover allowance for weekend work.<sup>98</sup> The SCHADs award, Aged Care Award, Educational Services (Schools) General Staff Award + Higher Education Industry – General Staff Award have the lowest sleepover allowances (around \$55 per sleepover), and cover female dominated industries. The result is an undervaluation of women’s work, including of caring work carried out for people with disability and older people.
118. We refer to individual affiliate submissions regarding increasing on call rates and valuing sleepover work properly.
119. We recommend that awards are varied to rectify the differences in payment for on call and recall to work provisions, which disproportionately impact women. Ordinary rates for employees required to standby for duty should be paid across the board, or at the very least, allowances

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<sup>96</sup> Senate Select Committee on Work and Care, Final Report (March 2023) at pp92, 119

<sup>97</sup> Discussion Paper at [206].

<sup>98</sup> For example, the Local Government Industry Award 2020, Victorian Local Government Award 2015 + Australian Federal Police Enterprise Award 2016

should be significantly increased. Consideration should also be given to the proper valuing of sleepover work, and its interaction with overtime and on call rates.

#### **Recommendation 19**

Awards should be varied to rectify the differences in payment for on call and recall to work provisions, which disproportionately impact women. Ordinary rates for employees required to standby for duty should be paid across the board, or at the very least, allowances should be significantly increased. Consideration should also be given to the proper valuing of sleepover work, and its interaction with overtime and on call rates.

#### **Question 12 – Travel time**

120. Payment for travel time while at work varies across awards, and not all awards provide for paid travel time to different locations or work sites, meaning caregivers may be giving up personal time without additional pay.<sup>99</sup> 7 of the 25 awards examined by the discussion paper do not contain provisions specifying that travel is paid at ordinary hours.<sup>100</sup> Again, most of these awards cover female dominated industries.
121. Working across multiple sites involves travel time, and many employees use their own car. If working in regional and remote areas, distances travelled are generally greater so there are increased fuel costs and wear and tear on the employee’s vehicle. There are also increased WHS and fatigue management issues, and greater risks of accidents.
122. More broadly, compensation for all hours worked, including on call provisions, paid travel time, and paid training, varies across modern awards.<sup>101</sup> The Work and Care Final Report found that low remuneration in the care economy is often compounded by the fact that many care workers are not paid for time spent travelling, being on call, completing administrative tasks or undertaking training.<sup>102</sup> This in turn can lead to financial stress, making it difficult to afford care services, further impacting on the work and care dynamic.<sup>103</sup> One study found that around 15% of the total hours worked by community sector workers were unpaid.<sup>104</sup>

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<sup>99</sup> Discussion paper at [207]; Senate Select Committee on Work and Care, Final Report (March 2023) at 92–94.

<sup>100</sup> Discussion paper at [209].

<sup>101</sup> Ibid at [210].

<sup>102</sup> Ibid; Senate Select Committee on Work and Care, Final Report (March 2023) at pp92–94.

<sup>103</sup> Ibid.

<sup>104</sup> Social Policy Research Centre, Submission 19, at p5. The submission cites research conducted in 2018 by Cortis and Blaxand, in Senate Select Committee on Work and Care, Final Report (March 2023) at 92.

123. These findings are consistent with the experience of our affiliates, who report significant issues of unpaid time in relation to work related travel, training, administrative responsibilities and handover in the care economy (home care, disability, residential aged care and children’s services), but also in other industries such as hospitality and fitness – again, all female dominated industries.
124. The lack of compensation for these kinds of work activities can have significant consequences for workers. For example, workers can face allegations and disciplinary investigations when administrative responsibilities such as notetaking or handover are not done properly. The NDIA asks workers whether they have ever been subject to any allegations as part of its screening process. This has important flow on effects for the recruitment and retention of workers in industries that are already experiencing a workforce crisis.
125. There is a clear need to vary awards to ensure they provide for appropriate compensation for all hours worked, an issue which is disproportionately affecting women workers. We refer to the individual submissions of our affiliates and the solutions proposed in those.
126. We recommend that awards be varied to provide appropriate compensation for all hours spent on work related travel, training, administrative responsibilities and handover.

**Recommendation 20**

Awards should be varied to provide appropriate compensation for all hours spent on work related travel, training, administrative responsibilities and handover.

**Question 13 – Annual leave**

127. Access to various leave arrangements can provide relief and support for employees balancing work and care.<sup>105</sup> Annual leave is necessarily entwined with caring responsibilities, with workers taking annual leave to manage their care arrangements, especially for children school age or younger. Annual leave is important for managing care during periods of school holidays and public holidays, as well as to support other forms of leave such as personal/carer’s leave when it is exhausted.
128. Taking leave can negatively impact an employee’s regular income, when it is paid at base rates that may be less than what the worker would earn if they had been working for the period of leave. Workers who work hours or rosters that attract penalty rates and allowances will experience a

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<sup>105</sup> Discussion paper at [224].



reduction in pay when they take leave. This can be a disincentive to taking leave and also devalues time that is taken away from work, including to attend to caring responsibilities.

129. The quantum of annual leave, and its adequacy, should also be considered. Given the amount of time working carers need to provide care additional to that covered by annual leave and personal/carer's leave, four weeks is not a lot of time.
130. Payment during paid leave should not fall below reasonable expectations of take home pay over the same period. Awards should be varied so that when employees take annual leave they get their ordinary hourly rate (including any penalties) plus a 17.5% annual leave loading.
131. In addition, the Commission should consider variations that respond to specific affiliate submissions, including regarding increased annual leave of 5 weeks (with 6 weeks for shift workers) and flexibility in how annual leave is taken (for example, flexibility to take twice as much annual leave at half pay, only at the request of the employee.)

**Recommendation 21**

Awards should be varied so that when employees take annual leave they get their ordinary hourly rate (including any penalties) plus a 17.5% annual leave loading.

The Commission should consider variations that respond to specific affiliate submissions regarding increased annual leave of 5 weeks (with 6 weeks for shift workers) and flexibility in how annual leave is taken.

**Questions 14 and 15– Personal/carer's leave and definition of immediate family**

132. Access to personal and carer's leave provide important relief and support for employees balancing work and care, and was designed to assist workers in reconciling their employment and family responsibilities.<sup>106</sup>
133. Personal and carer's leave has a number of limitations, including that the entitlement is narrow in scope (with the definition of carer and its limited applicability to immediate family and household members being narrowly defined, and the entitlement being limited to situations where there is an illness, injury or unexpected emergency); lack flexibility; provide insufficient time for leave; and workers lose access to leave entitlements when taking personal leave to care for others,

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<sup>106</sup> Discussion paper at [224], [230].

which may prevent carers being able to access sufficient leave to provide care and look after their own health and wellbeing (due to personal/carer's leave being a single entitlement of 10 days).<sup>107</sup>

134. The definition of carer has not kept up with the many different kinds of family groups and the changing nature of families. It excludes many workers with caring responsibilities. There is a clear need to ensure that the full range of caring relationships is recognised, including kinship care.

135. Recommendation 17 of the Work and Care Final Report provided that the definition of 'immediate family' be amended and broadened for the purposes of an employee accessing carer's leave. It proposed that in addition to the current definition, the following people should be classified as 'immediate family':

- Any person who is a member of an employee's household, and has been for a continuous period of over 18 months;
- Any of the employee's children (including adopted, step and ex-nuptial children);
- Any of the employee's siblings (including a sibling of their spouse or de factor partner); and
- Any other person significant to the employee to whom the employee provides regular care

136. We concur with the above recommendation, with the addition of kinship care and foster children.

137. Personal and carer's leave is also paid at base rates that are less than what the worker would earn if they had been working for the period of leave. This can be a disincentive to taking leave and also devalues time taken away from work to attend to caring responsibilities.

138. Evidence requirements for taking personal and carer's leave are onerous, and require workers to produce evidence on each occasion if required by the employer, even where illness, injury or caring responsibilities may be ongoing over a long period of time. These evidence requirements are costly, time consuming, and can be significant disincentive to workers taking the leave they need.

139. These limitations significantly affect the ability of workers to balance their work and care responsibilities, and disproportionately impact women who still shoulder the vast burden of unpaid care, with implications for their income, economic security (including in retirement), workforce participation and health and wellbeing.

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<sup>107</sup> Discussion paper at [234]-[235]; Senate Select Committee on Work and Care, Final Report (March 2023) at 145-151; Productivity Commission, A case for an extended unpaid carer leave entitlement? Inquiry report (September 2023) at 5.

140. To ensure that these provisions meet the modern awards objective, the following variations to awards are required:

- Payment during paid leave should not fall below reasonable expectations of take home pay over the same period to ensure that workers taking paid personal and carer's leave do not suffer a diminution in the amount they ordinarily earn.
- Paid personal and carer's leave should be made available to employees who care or expect to care for a dependent or any other person significant to the employee to whom the employee provides regular care (in line with Recommendation 17 of the Work and Care Final Report).
- Paid personal and carer's leave should be made available to foster parents to ensure they have access to entitlements to provide the necessary care and support to foster children in their care; and should also include kinship care.
- Paid personal and carer's leave should be extended to include a broader range of carer responsibilities that are not limited to illness, injury or emergencies, and include other caring activities such as organising formal care arrangements, attending medical and other appointments, and palliative care.
- Workers should have the ability to use enduring forms of evidence for enduring illness, injury or caring responsibilities to demonstrate their need to take personal or carer's leave, rather than being required to produce evidence on each occasion such leave is requested.
- The amount of dedicated carer's leave should be increased by 10 days.

### **Recommendation 22**

Awards should be varied as follows:

- Payment during paid leave should not fall below reasonable expectations of take home pay over the same period to ensure that workers taking paid personal and carer's leave do not suffer a diminution in the amount they ordinarily earn.
- Paid personal and carer's leave should be made available to employees who care or expect to care for a dependent or any other person significant to the employee to whom the employee provides regular care (in line with Recommendation 17 of the Work and Care Final Report).
- Paid personal and carer's leave should be made available to foster parents to ensure they have access to entitlements to provide the necessary care and support to foster children in their care; and should also include kinship care.
- Paid personal and carer's leave should be extended to include a broader range of carer responsibilities that are not limited to illness, injury or emergencies, and include other caring activities such as organising formal care arrangements, attending medical and other appointments, and palliative care.

- Workers should have the ability to use enduring forms of evidence for enduring illness, injury or caring responsibilities to demonstrate their need to take personal or carer’s leave, rather than being required to produce evidence on each occasion such leave is requested.
- The amount of dedicated carer’s leave should be increased by 10 days.
- An additional entitlement to unlimited unpaid personal and carer’s leave should be provided where paid personal and carer’s leave has been exhausted, and all other forms of flexible workplace arrangements have been explored.

### Question 16 – Unpaid carer’s leave

141. We note the recent Productivity Commission report which considered whether an entitlement to extended unpaid carer’s leave should be available to employees.<sup>108</sup> The report found that whilst adding an entitlement for 1-12 months extended unpaid carer’s leave may help to support carers, such an entitlement was not appropriate for multiple reasons. These included: the impact on household income and the episodic nature of some caring roles would render the entitlement unsuitable or inaccessible for many carers; it would not improve equity across caring situations; and it was likely not the lowest cost way for employers to accommodate working carers. The report instead suggested that flexible working arrangements can be a better alternative to extended unpaid leave.<sup>109</sup>
142. We concur with the report inasmuch as there is a significant danger in entrenching unpaid leave as an entitlement given women will disproportionately use this form of leave, with significant implications for their economic security. The primary objective should be that carers are financially supported whilst caring – that is, they should have access to paid work that supports them to care, or paid time off to care.
143. The current limitations of flexible working arrangements and our recommendations regarding flexible work in response to discussion paper question 2 are directly relevant here. It is vital that flexible working arrangements are strengthened in awards to ensure that employees have access to flexible work that allows them to be financially supported whilst caring.
144. However, there may be some situations where employees have no other option but to take a period of unpaid leave due to caring responsibilities. In those situations, there is a benefit in keeping those employees connected to their job with the ability to return, with obvious benefits for workforce participation and inclusion. Such an entitlement should be used as a last resort, and

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<sup>108</sup> Productivity Commission, A case for an extended unpaid carer leave entitlement? Inquiry report, (September 2023).

<sup>109</sup> Ibid, at 71–74.

only after all possible options for flexible work have been explored and exhausted by the employer, including working from home.

145. Accordingly, awards should be varied to provide an additional entitlement to unlimited personal and carer's leave where paid personal and carer's leave has been exhausted, all other forms of flexible workplace arrangements (including working from home) have been explored and exhausted, and the employee elects to take unpaid leave.

**Recommendation 23**

Awards should be varied to provide an additional entitlement to unlimited personal and carer's leave where paid personal and carer's leave has been exhausted, all other forms of flexible workplace arrangements (including working from home) have been explored and exhausted, and the employee elects to take unpaid leave.

**Question 17 – Personal/carer's leave (separation of entitlements)**

146. As observed above, the combined nature of the entitlement to carer's leave and personal leave can mean that carers have insufficient leave balances to access time off when they are unwell, which makes it more difficult for carers to manage their own health and wellbeing.<sup>110</sup> The Productivity Commission report recommended that the government review whether paid sick leave and carer's leave should be included in the same entitlement, and the appropriate quantum.<sup>111</sup> Recommendation 18 of the Work and Care Final Report was in similar terms – that the government consider the adequacy of existing leave arrangements and investigate potential improvements, including separate carer's leave and annual leave.
147. The entitlements should not be separated without an increase in the quantum, as this would raise complex issues of how much leave an employee could take for each purpose, and result in unfairness to employees who would have less dedicated leave entitlements for each purpose than they do currently.
148. As per Recommendation 22 above, the quantum of carer's leave needs to be increased. Awards should be varied to provide for an additional amount of 10 days paid carer's leave, that can only be taken for caring purposes. Employees should retain the ability to access personal/carer's leave for caring purposes if they have exhausted the 10 days carer's leave, and need more paid leave for caring purposes.

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<sup>110</sup> Discussion paper at [247]; Productivity Commission, A Case for an extended unpaid carer leave entitlement Inquiry Report (September 2023) at 10.

<sup>111</sup> Ibid.

## Recommendation 24

Awards should be varied as follows:

- To provide for an additional amount of 10 days paid carer's leave, that can only be taken for caring purposes.
- Employees should retain the ability to access personal/carer's leave for caring purposes if they have exhausted the 10 days carer's leave, and need more paid leave for caring purposes.

## Question 18 – Ceremonial leave

149. As the discussion paper observes, for many First Nations Australians, caring for community members can fall within cultural expectations and traditional kinship responsibilities.<sup>112</sup>
150. This offers many benefits, but also means that First Nations people (especially women and girls) are more likely to be unpaid carers than non-Indigenous Australians.<sup>113</sup> Recent AHRC Research suggests that at least 14% of First Nations people aged 15 and over are providing unpaid care (with numbers likely to be much higher given many First Nations carers do not readily self-identify).<sup>114</sup>
151. Some awards recognise the cultural rights and needs of First Nations employees through provision of cultural or ceremonial leave. However, the majority of modern awards do not provide for ceremonial leave for First Nations employees. Of the 25 awards examined in the discussion paper, only 4 provide for cultural leave provisions.<sup>115</sup> For example, the Nurses Award and SCHADS Award provide for up to 10 days unpaid leave where “legitimately required by indigenous tradition” subject to employer approval.
152. Ceremonial leave provisions respect the distinct cultural and traditional practices of First Nations Employees. Given the significant overlap in caregiving and cultural responsibilities, the lack of ceremonial and cultural leave entitlements across modern awards represents a large gap in the safety net for First Nations employees’ responsibilities outside of work.<sup>116</sup> The Full Bench has previously found that an entitlement to ceremonial leave in awards was consistent with the modern awards objective and the need to promote social inclusion through increased workforce participation in s134(1)(c).<sup>117</sup>

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<sup>112</sup> Discussion paper at [59]-[60]; AHRC, Wiyi Yani U Thangani (Women's Voices): Securing our Rights, Securing our Future Report (December 2020) at 327.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Discussion paper at [62]-[63].

<sup>116</sup> Discussion paper at [62]-[63].

<sup>117</sup> 4 yearly review of modern awards – Group 2 [2016] FWCFB 7254 [120]-[125].

153. The existing ceremonial leave provisions in awards<sup>118</sup> are insufficient in a few key ways: only unpaid leave is provided; the phrase “legitimately required by indigenous tradition” is an unnecessary, burdensome and overcomplicated threshold (and additional to the threshold of “for ceremonial purposes”); it is subject to the approval of the employer; and the employer’s discretion is not limited or qualified.
154. Awards should be varied to insert new ceremonial leave provisions into all awards. The proposed wording for such a clause is being developed in consultation with the ACTU’s Aboriginal and Torres Strait Islander Committee. Proposed wording will be provided as part of our reply submissions.
155. As the discussion paper acknowledges, Aboriginal and Torres Strait Islander employee’s caring and cultural obligations extend beyond a need for ceremonial leave<sup>119</sup>, and there is a need for award clauses that recognise this. This includes recognising foster and kinship care leave<sup>120</sup> and expanding definitions of family and household as set out in Recommendation 22 above.
156. The Commission should also consider the need for clauses that recognise the additional work and care requirements of First Nations employees, such as cultural load and cultural responsibility clauses that provide for an allowance or payment<sup>121</sup> (or acknowledging this work in schedules of classifications), and clause that provide for language allowances.<sup>122</sup>

#### **Recommendation 25**

- New ceremonial leave provisions should be included in all awards.
- Foster and kinship care should be recognised for the purposes of accessing personal and carer’s leave.
- The Commission should consider the need for clauses that recognise the additional work and care requirements of First Nations employees, such as cultural load and cultural responsibility clauses that provide for an allowance or payment, and clause that provide for language allowances.

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<sup>118</sup> “An employee who is legitimately required by indigenous tradition to be absent from work for Aboriginal or Torres Strait Islander ceremonial purposes will be entitled to up to 10 working days unpaid leave in any one year, with the approval of the employer.”

<sup>119</sup> Discussion paper at [59]-[63].

<sup>120</sup> For example, see [Victorian Government Schools Agreement](#), at clause 26.19

<sup>121</sup> For example, see [Victorian Government Schools Agreement](#) at clause 14(17)

<sup>122</sup> For example, see Annex C of [ACT Public Sector Education Directorate \(Teaching Staff\) Enterprise Agreement 2023-2026](#).

### Question 19 – Other variations

157. We note that this question invites other variations to modern award provisions that would assist employees to meet their caring responsibilities and are necessary to meet the modern awards objective. There are a large and broad number of variations that due to time constraints, we are unable to fully elaborate on in this submission, that we submit are necessary to achieve gender equality in the workplace because they provide workplace conditions that facilitate women’s full economic participation.

158. These variations include the following:

- Variation providing for additional support for breastfeeding and lactation including paid breaks and appropriate facilities. This is raised in the discussion paper, with reference to Article 10(1) of the Maternity Protection Convention which provides that ‘A woman shall be provided with the right to one or more daily breaks or a daily reduction in hours of work to breastfeed her child.’<sup>123</sup> Australia is an outlier in this respect<sup>124</sup> and one of only a few countries without statutory entitlements to breastfeeding breaks at work or facilities. The absence of a clear entitlement, as in Australia, may deter parents from taking these breaks, particularly where they are unpaid.<sup>125</sup>
- Variation providing entitlements to paid leave to attend appointments associated with pregnancy, adoption, surrogacy and permanent care orders (including attending pre-natal appointments with a partner who is pregnant).
- Variation requiring an employer to demonstrate that a redundancy is bona fide, and reasonable accommodations cannot be made, where the redundancy is for an employee during or returning from a period of parental leave.
- Variation recognising periods of unpaid parental leave as active service to ensure the accrual of all entitlements and payment of public holidays during periods of paid and unpaid parental leave.
- Variation providing for access to safe, secure and dedicated facilities/equipment for women in male dominated industries eg bathrooms, changerooms, personal protective equipment (PPE)/clothing/uniforms and so on.
- Variation providing for additional pay on termination for those with parenting responsibilities.

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<sup>123</sup> International Labour Organisation, Maternity Protection Convention, R183, 88th sess, (15 June 2000)

<sup>124</sup> Senate Select Committee on Work and Care, Final Report (March 2023) xxiv, xxvii.

<sup>125</sup> Discussion paper at [217]-[221].



- Variation providing for paid community service leave and paid disaster management leave for employees who are volunteers with emergency management organisations, to acknowledge the significant work done in caring for people in the community.
- Variation providing for grandparental leave, which would provide an eligible employee access to 52 weeks unpaid leave for each grandchild during the period up until the child's 5<sup>th</sup> birthday, with 12 weeks paid.

**Recommendation 24**

The Commission should consider other award variations as outlined in the ACTU submission and the submissions of our affiliates that provide workplace conditions that facilitate women's full economic participation, and are necessary to achieve gender equality in the workplace and the modern awards objective.

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